No. 78-379

In the Supreme Court of the United States

OCTOBER TERM, 1978

W. J. HOUSE, SUPERINTENDENT OF THE GREENSBORO CITY SCHOOLS, ET AL., PETITIONERS

v.

JAMES C. STEWART, ASSISTANT AREA DIRECTOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not reported. The opinion of the district court (Pet. App. 4a-7a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 1978. The petition for a writ of certiorari

was filed on September 5, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Equal Pay Act may be applied to the states and their subdivisions.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

1. The pertinent provisions of the Equal Pay Act of 1963, 29 U.S.C. 206(d), are set out at Pet. App. 10a.

2. The Fourteenth Amendment provides in relevant part:

> SECTION 1. * * * No state shall * * * deny to any person within its jurisdiction the equal protection of the laws.
>
> * * * *
>
> SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

3. The Commerce Clause, Art. I, Sec. 8, Cl. 3 provides in relevant part:

> The Congress shall have Power * * * To regulate Commerce * * * among the several States * * *

STATEMENT

Petitioners brought this action seeking a declaratory judgment that the Greensboro City Board of Education, as a political subdivision of a state, is not

subject to the Equal Pay Act. The district court, following *Usery* v. *Charleston County School District*, 558 F.2d 1169 (4th Cir. 1977), granted respondents' motion to dismiss for failure to state a claim on which relief could be granted.

Charleston County held that the Equal Pay Act may constitutionally be applied to states and their subdivisions. The court rejected the argument that this Court's decision in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), which invalidated a portion of the Fair Labor Standards Act as applied to the states, requires invalidation of the Equal Pay Act. Instead, the court of appeals relied on *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), and held that the Equal Pay Act's application to the states is a constitutional exercise of Congress' power under Section 5 of the Fourteenth Amendment to secure equal rights without regard to gender. In light of its earlier decision in *Charleston County*, the court of appeals here summarily affirmed the district court's decision.

ARGUMENT

Four courts of appeals have addressed the question whether the Equal Pay Act constitutionally may be applied to the states. Each has held that it may be.[1] Three of these courts, including the court below, have held that the Act as applied to states is a proper exercise of Congress' power under the Fourteenth

[1] Thirty-five district courts have reached the same conclusion. A list of these cases, and of one contrary decision, is attached as an Appendix to this brief.

Amendment. *Usery* v. *Charleston County School District*, 558 F.2d 1169 (4th Cir. 1977); *Usery* v. *Allegheny County Institution District*, 544 F.2d 148 (3d Cir. 1976), cert. denied, 430 U.S. 946 (1977); *Marshall* v. *Owensboro-Daviess County Hospital*, 581 F.2d 116 (6th Cir. 1978). See also *Marshall* v. *City of Sheboygan*, 577 F.2d 1 (7th Cir. 1978) (upholding the Act under the Commerce Clause). There is thus no conflict among the circuits and no reason for review by this Court.

This Court held in *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), that the Fourteenth Amendment worked a fundamental alteration of the allocation of power within our federal system. *Fitzpatrick* therefore sustained, against an Eleventh Amendment challenge, the power of Congress to provide for back pay as a remedy for unequal treatment on account of sex. The Equal Pay Act achieves the same objective—equal treatment without regard to sex—and is constitutional under the same grant of power to Congress. As the Court stated in *Ex parte Virginia*, 100 U.S. 339, 347-348 (1880), "the Constitution now expressly gives authority for congressional interference and compulsion in the cases embraced within the Fourteenth Amendment. It is but a limited authority, true, extending only to a single class of cases; but within its limits it is complete."

Petitioner argues that the Equal Pay Act must fall with the Fair Labor Standards Act, part of which this Court held unconstitutional in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). It is true

that the Equal Pay Act was placed within the Fair Labor Standards Act, but that does not end the matter. The Equal Pay Act is a separately considered statute enacted in 1963. It was "enacted at a different time, and aimed at a separate problem—discrimination on account of sex in the payment of wages" (*Usery* v. *Allegheny County Institution District*, *supra*, 544 F.2d at 155). The Fair Labor Standards Act contains a broad severability clause (29 U.S.C. 219), and so there is no reason why the Equal Pay Act should be affected by *National League*, unless the rationale of *National League* applies here as well.

We already have discussed the most important difference between this case and *National League;* although the minimum wage and overtime provisions of the Fair Labor Standards Act were enacted under the authority of the Commerce Clause alone, the sex discrimination provisions at issue here draw support from Section 5 of the Fourteenth Amendment as well as from the Commerce Clause.

Petitioner responds that the Equal Pay Act must be assessed as if it drew its authority from the Commerce Clause alone, because Congress explicitly invoked its Commerce Clause power when enacting the statute. The court of appeals properly rejected the argument that Congress must cite the correct source of power when enacting a statute;[2] the constitutionality of Acts of Congress depends on the substance of their provisions, not on whether the com-

[2] See *Usery* v. *Charleston County School District*, *supra*, 558 F.2d at 1171. See also *Usery* v. *Allegheny County Institution District*, *supra*, 544 F.2d at 155.

mittee reports or the preamble contain particular invocations of authority. The procedures for the enactment of legislation specified by Article I of the Constitution do not require Congress to publish legislative history or write a preamble to each statute—let alone to state an accurate constitutional theory in such documents. Nothing in Article I, or elsewhere in the Constitution, authorizes a court to strike down otherwise valid legislation merely because Congress misconceived the source of its authority to enact it. "In exercising the power of judicial review * * * we are concerned with the *actual powers* of the national government" (*Usery* v. *Allegheny County Institution District*, *supra*, 544 F.2d at 155; emphasis added).

The proper question is "whether there is any authority conferred upon Congress by which this particular portion of the statute can be sustained." *Keller* v. *United States*, 213 U.S. 138, 147 (1909). Indeed, Title VII of the Civil Rights Act of 1964, which this Court upheld in *Fitzpatrick* as an exercise of authority under Section 5 of the Fourteenth Amendment, also purported to be only an exercise of authority under the Commerce Clause. At the time Title VII was enacted in 1964 it applied only to private persons, just as the Equal Pay Act applied only to private persons when it was enacted in 1963. There therefore would have been no basis for a congressional assertion of power under the Fourteenth Amendment, which applies only to state action. Similarly, when Title VII was made applicable to the states in 1972, and when the Equal Pay Act was made applicable to petitioners in 1966 (and to other

governmental entities in 1974), there was no reason for Congress to rely heavily on its powers under the Fourteenth Amendment. The Civil Rights Act of 1964 had been sustained as a valid Commerce Clause enactment (*Katzenbach* v. *McClung*, 379 U.S. 294 (1964)), and the 1966 extension of the Fair Labor Standards Act to governmental entities like petitioner also was sustained as a valid Commerce Clause enactment (*Maryland* v. *Wirtz*, 392 U.S. 183 (1968)). The fact that *National League* now has held that reliance upon the Commerce Clause was misplaced does not mean, however, that the Equal Pay Act may not be upheld under the Fourteenth Amendment. Under our constitutional system, a court is not authorized to invalidate a statute, otherwise within the substantive powers of Congress, just to see whether Congress would re-enact the statute with a different citation of constitutional authority.[3]

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[3] Petitioners argue that the *Civil Rights Cases*, 109 U.S. 3 (1883), demonstrate that the Court will look only to the constitutional basis named by Congress. The Court there remarked that particular legislation was not "conceived" as implementing the Commerce Clause, and that "no other ground of authority for its passage [had been] suggested" (109 U.S. at 25). The Court has since explained that this passage means only that the government had not relied on the Commerce Clause or argued that issue to the Court. *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 252 (1964). Indeed, the Court itself has sustained an Act of Congress on a ground that Congress did not invoke; in *Griffin* v. *Breckenridge*, 403 U.S. 88, 104-107 (1971), the Court upheld the statute under Section 2 of the Thirteenth Amendment and the constitutional privilege of interstate travel in order to avoid considering the meaning of the Privileges and Immunities Clause of the Fourteenth Amendment, on which Congress had relied.

Moreover, the Equal Pay Act is a valid exercise of power under the Commerce Clause, without regard to its validity under the Fourteenth Amendment. *National League* did not hold that Congress lacks any power under the Commerce Clause to regulate the states; the Court specifically stated (426 U.S. at 852-855) that it was not disturbing the holdings of *Fry* v. *United States*, 421 U.S. 542 (1975), *Parden* v. *Terminal R.R.*, 377 U.S. 184 (1964), *California* v. *Taylor*, 353 U.S. 553 (1957), and *United States* v. *California*, 297 U.S. 175 (1936), all of which sustained legislation, enacted under the commerce power, regulating states in their role as employers.

The Court concluded in *National League* that the Commerce Clause does not establish sufficient authority for the federal government to interfere in certain attributes of sovereignty that the states and their subdivisions exercise in carrying out traditional functions of government. The Equal Pay Act does not interfere in any significant way with the manner in which states are permitted to carry out their functions.

The minimum wage and overtime provisions of the Fair Labor Standards Act set wage and hour standards that could have required the states to rearrange the way jobs were performed and to pay their employees higher wages than state statutes provided. The Equal Pay Act, by contrast, does not compel any state to pay one wage rather than another. States retain full control over the wages paid to their employees; they retain full control over the number of employees to hire for each job, and what hours

they shall work. The Equal Pay Act provides only that, once the state in its sole discretion has set a wage rate for employees of one sex, it must pay the same rate to employees of the other sex doing substantially equal work. This does not impinge on state autonomy or threaten to undermine the performance by the states of any of their essential and customary functions.[4] Therefore, under the standards this Court applied in *National League*, the Equal Pay Act would be a permissible exercise of the commerce power even if it stood on that power alone.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] Indeed, states could not reasonably claim that they have an interest in paying different wages to men and women who do the same work, because such sex discrimination would violate the Equal Protection Clause of the Fourteenth Amendment. It is hard to see how a state could argue that violations of the Equal Protection Clause are an "essential attribute" of its sovereignty.

APPENDIX

1. District court decisions upholding the Act after *National League of Cities.*

Christensen v. *Iowa*, 417 F. Supp. 423 (N.D. Iowa 1976)

Usery v. *Sioux City Community School District*, No. C-76-4024 (N.D. Iowa Aug. 20, 1976)

Usery v. *Fort Madison Community School District*, No. C-75-62-1 (S.D. Iowa Sept. 1, 1976)

Usery v. *Bettendorf Community School District*, 423 F. Supp. 637 (S.D. Iowa 1976)

Usery v. *Berkeley Unified School District*, No. C-75-1558 SAW (N.D. Cal. Sept. 27, 1976)

Usery v. *Kent State University*, No. 75-550 (N.D. Ohio Oct. 6, 1976), appeal pending, No. 77-3284 (6th Cir.)

Usery v. *Washoe County School District*, No. 75-216 BRT (D. Nev. Oct. 14, 1976)

Usery v. *University of Nevada*, Reno No. 75-62 BRT (D. Nev. Oct. 13, 1976)

Usery v. *Dallas Independent School District*, 421 F. Supp. 111 (N.D. Tex. 1976), appeal pending, No. 77-2174 (5th Cir.)

Usery v. *University of Texas*, No. EP-75-CA-221 (W.D. Tex. Oct. 14, 1976)

Usery v. *Memphis State University*, No. C-75-54 (W.D. Tenn. Oct. 29, 1976)

Usery v. *Baltimore County School District*, No. K-76-762 (D. Md. Nov. 16, 1976)

Usery v. *City of Brockton*, No. 76-2265-M (D. Mass. Nov. 9, 1976)

Usery v. *Morrissey*, No. CA-74-2311 (D. Mass. Nov. 9, 1976)

Usery v. *A&M Consolidated Independent School District*, No. 74-H-1532 (S.D. Tex. Nov. 30, 1976), appeal pending, No. 77-2495 (5th Cir.)
Usery v. *Tennessee Technological University*, No. 75-7-NE-CV (M.D. Tenn. Dec. 14, 1976)
Usery v. *Austin Peay State University*, No. 75042-NA-CV (M.D. Tenn. Dec. 14, 1976)
Usery v. *Kenosha Unified School District Number One*, No. 73-C-399 (E.D. Wis. Dec. 13, 1976)
Brown v. *County of Santa Barbara*, 427 F. Supp. 112 (C.D. Cal. 1977)
National League of Cities v. *Marshall*, No. 74-1812 (D. D.C. Jan. 31, 1977) (three-judge court)
Usery v. *Eastern Kentucky University*, No. C.A. 76-15 (E.D. Ky. Jan. 21, 1977)
Usery v. *Council Bluffs Community School District*, No. 76-26-W (S.D. Iowa Jan. 27, 1977)
Usery v. *Oregon*, No. 74-629 (D. Ore. Feb. 14, 1977), appeal pending, No. 77-2813 (9th Cir.)
Usery v. *Miami University*, No. C-1-75-240 (S.D. Ohio Feb. 14, 1977)
Usery v. *Edward J. Meyer Memorial Hospital*, No. C-71-453 (W.D. N.Y. April 4, 1977)
Usery v. *County of Oakland*, No. C.A. 6-70593 (E.D. Mich. Apr. 14, 1977)
Marshall v. *City of Torrington*, No. H-74-159 (D. Conn. July 1, 1977)
Usery v. *Board of Education*, Civ. No. 15,071 (D. Conn. July 7, 1977)
Marshall v. *Board of Education*, Civ. No. 75-453 (W.D. N.Y. July 12, 1977)
Usery v. *McCarthy*, No. C.A. 76-2149-T (D. Mass. July 22, 1977) (three-judge court)

Nilsen v. *Metropolitan Fair & Exposition Authority*, No. 76-C02856 (N.D. Ill. Aug. 18, 1977)
Marshall v. *Independent School District No. 271*, No. 4-76 Civ. 274 (D. Minn. Oct. 3, 1977)
Wilkins v. *University of Houston*, No. 75-H-644 (S.D. Tex. Nov. 22, 1977)
Marshall v. *Nassau County Medical Center*, No. 77 C 540 (E.D. N.Y. Feb. 17, 1978)
Marshall v. *Evans-Bryant Central School District*, Civ. No. 77-209 (W.D. N.Y. Jan. 12, 1978)

2. District court decision holding the Act invalid. *Howard* v. *Ward County*, 418 F. Supp. 494 (D. N.D. 1976)

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